No. 1040

Supreme Court of the United States

October Term, 1944

EX PARTE HAWKE

GEORGE S. HAWKE,
Petitioner.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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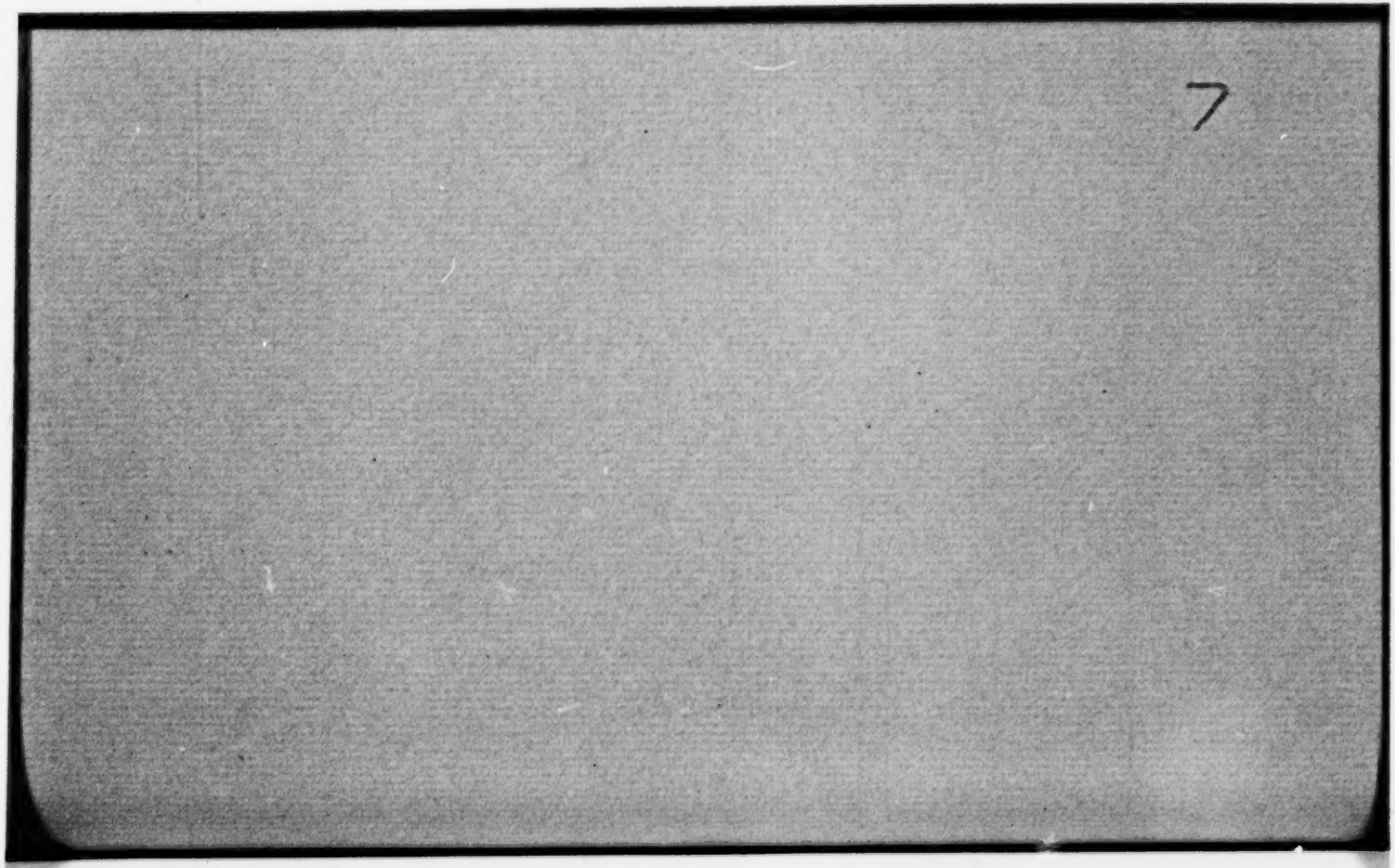
Cincinnati,
Petitioner.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Petitioner asks for a writ to be directed to the U. S. Circuit Court of Appeals for the Sixth Circuit, to review the judgment of that Court of December 9, 1944, dismissing appeal upon motion, without hearing on the merits, under the presumed authority of Rule 75 of the Federal Rules of Civil Procedure, and the final judgment on Petition for Rehearing, which was denied December 13, 1944.

Jurisdiction

The jurisdiction of this Court is invoked under Sec. 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

Questions Presented

(1) Whether or not, as a question of general importance in the Public Interest, uniformity of decision among Circuit Courts of Appeal, as to Section 75 of the Federal Rules of Civil Procedure (28 USCA following 723-c) should be had, looking to the simplification of procedure in appellate practice, in order to permit an appellant to SUPPLEMENT THE TRANSCRIPT OF TESTIMONY if found necessary and to permit the liberal construction of said Rule so as to promote justice and relieve against undue hardship, in order that the system of Federal Justice may be appropriately administered, SAID RULE 75 NEVER HAVING BEEN CONSTRUED IN THIS COURT.

(2) Whether or not, on the face of the record in this case and of the OPINION, the Court of Appeals erred in dismissing the appeal under said RULE 75 on motion, without any review on its merits, and in denying the Petition for Rehearing and the prayer for leave to SUPPLEMENT THE TRANSCRIPT OF "TESTIMONY".

Opinions Below

The Opinion of the District Court is shown on page 25 in the printed Transcript of Record in the Court of Appeals.

The per curiam of the Court of Appeals was rendered December 9, 1944, and is shown in the papers certified to this Court.

Rule 75 of Federal Rules of Civil Practice is Involved

We quote part of Rule 75 (c), "FORM OF TESTIMONY."

> "FORM OF TESTIMONY." *Testimony* of witnesses designated for inclusion need not be in narrative form, but may be in question and answer form. A party may prepare and file with his designation a condensed statement in narrative form of all or part of the *testimony*, and any other party to the appeal, if dissatisfied with the narrative statement, may require *testimony* in question and answer form to be substituted for all or part thereof."

Definition of the Word "Testimony"

We quote the legal definitions of the word "*testimony*" in our Brief.

Summary and Short Statement of the Matter Involved

An appeal was perfected from an order of the District Court for the Southern District of Ohio, suspending for two and one-half years Mr. George S. Hawke, a lawyer duly admitted to practice in said District Court.

A Special Committee of lawyers appointed by the District Court, filed a Motion, under authority of Rule 75 (c)

in the Court of Appeals on July 5, 1944 for Substitution of "TESTIMONY" in question and answer form, for the narrative statement.

On October 17, 1944 the Court of Appeals, acting through Judges Simons, Allen and Martin, granted said motion, and also directed the filing of the exhibits to the "TESTIMONY", in the Court of Appeals, and permitted the Transcript of the Testimony to be in typewritten form, and further provided that in the event of the failure of appellant to comply with said order, the appeal would be dismissed for want of prosecution.

With full desire and every effort to comply with said order, four typewritten copies, (as provided in the Rules of said Court of Appeals) of ALL THE "TESTIMONY" were duly filed within the time by appellant.

Thereafter on November 9, 1944 the Special Committee filed a motion to dismiss the appeal for want of prosecution. IT DID NOT CLAIM IN SAID MOTION THAT APELLANT HAD NOT FILED A COMPLETE TRANSCRIPT OF THE "TESTIMONY", but represented in said Motion that he had not filed a copy of the "RECORD", and that he had omitted "professional statements" of himself and of the prosecuting Committee, and that the transcript filed showed only a small portion of the occurrences at the trial.

On December 9, 1944 the Court of Appeals, acting this time through Judges Hicks, Simons and Martin, entered an Order sustaining said Motion for want of prosecution, for the reasons stated per curiam.

Appellant on December 11, 1944 filed his Petition for Rehearing, and to set aside said order dismissing appeal, AND FURTHER PRAYED FOR LEAVE TO SUPPLEMENT THE TRANSCRIPT OF TESTIMONY to include the additional matters indicated by the Court to be necessary. On December 13, 1944 the Court of Appeals entered an order as follows: "The petition for rehearing and to set aside order dismissing appeal is hereby denied," but made no reference to the prayer for leave to SUPPLEMENT THE TRANSCRIPT OF THE TESTIMONY, although the matter was subsequently called to its attention, when on December 21, 1944 appellant filed a motion to set

aside or modify the orders of December 13th and December 9th. On Jan. 15, 1945 the Court overruled said motion.

RULE 10, PAR. 1, SIXTH CIRCUIT COURT OF APPEALS. APPEALS IN CIVIL ACTIONS.

1. "Federal Rules of Civil Procedure, adopted by the Supreme Court pursuant to Act of June 19, 1934, Nos. 73, 74, 75 and 76, are adopted as rules of this court in cases to which they may apply."

Specification of Errors to be Urged

The Court of Appeals prejudicially erred in:

(1) That the Circuit Court of Appeals has rendered a decision in conflict with the decision of another Court of Appeals on the same matter of general importance in the public interest, namely a construction of Rule 75 of the Federal Rules of Civil Procedure.

(2) That it has decided an important question of Federal law, which has not been, but should be, settled by this Court, to-wit, said Rule 75.

(3) That said Court has so far departef from the accepted and usual course of judicial proceedings, that it has denied Petitioner leave under said Rule 75 to correct his Transcript of Testimony, by filing a Supplemental Transcript embodying the matters indicated by the Court to be further necessary.

(4) That it has, in violation of said Rule 75, dismissed the Appeal herein without any review on its merits, thereby causing a miscarriage of justice.

WHEREFORE, it is respectfully submitted that this Petition should be granted.

George S. Hawke

Petitioner.